

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Disqualification – Not
Set Aside and Revocation of the License
of Patricia Anderson to Provide Family
Child Care

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 19, 2004, at Polk County Social Services, 116 1st St. E., Fosston, Minnesota.

Larry D. Orvik, Assistant Polk County Attorney, 223 E Seventh St, No. 101, Crookston, MN 56716, appeared for Polk County Social Services (PCSS) and the Department of Human Services (the Department). Patricia Anderson (Licensee), 416 N Johnson, Fosston, MN 56742, represented herself. The hearing record closed at the conclusion of the hearing.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

Whether Licensee poses a risk of harm to her day care children so that her disqualification for conviction of misdemeanor theft should not be set aside.

The Administrative Law Judge concludes that Licensee does not pose a risk of harm. related to the theft conviction and that the disqualification should be set aside.

Whether Licensee's family child care license should be revoked based upon repeated, chronic, and serious instances of failure to adequately supervise children in her care.

The Administrative Law Judge concludes that the license should be revoked.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is a resident of Fosston, which is in Polk County, and has been licensed as a Family Child Care Provider for seven years. Her current Licensing Social Worker is Irene Hurd.^[1]

2. Licensee has seven children. The oldest, a 17 year old girl, is away at college; the rest live at home with Licensee. They are girls now age 16, 12, and 3, and boys now age 10, 8, and 7. The three boys and the 12 year old girl have ADHD. The youngest boy is particularly compulsive. Licensee has two former husbands, neither of whom live with her now. Her income includes only child support sporadically from one of the former husbands, a partial Minnesota Family Investment Program (MFIP) grant, and day care.^[2]

3. In 1990 and 1994, Licensee was convicted of Wrongfully Obtaining Assistance in violation of Minn. Stat. § 256.98. Those crimes involved receiving assistance while a father was living in the home. When she was licensed, the disqualification for those crimes was set aside.^[3]

4. Licensee provided child care in a home she rented at 312 First St. W, Fosston, for about seven years up to September 30, 2003. First Street is also U.S. Highway 2, the main highway through Fosston.

5. On April 26, 2000, Hurd was driving by Licensee's home and noticed a toddler in the street in front of the house. The child was Licensee's youngest son. Licensee claims the boy was being watched by her mother at the time and that it was

late afternoon and there were no day care children present. Hurd issued a correction order to Licensee for the violation, presumably for failure to supervise.^[4]

6. On July 17, 2003, PCSS received two reports of possible maltreatment of daycare children at Licensee's home. The matter was investigated by child protection worker Jodi Anderson under Minn. Stat. § 626.556 and by a deputy sheriff. Two of Licensee's sons, the ones now 8 and 10 years old, had been engaging in sexual behaviors with three of the girls in daycare, ages four to seven. The behavior included the boys kissing the girls, touching them inappropriately, "humping" them, and, on one occasion, one of the boys pulling down a girl's pants and underpants, as well as his own, and attempting intercourse with the girl. On all these occasions, Licensee was not available in the area to supervise the children, but was in her own bedroom, sometimes with her boyfriend.^[5]

7. On August 22, 2003, Anderson issued a letter notice to Licensee that PCSS had determined that neglect had occurred for which she was responsible and that Child Protective Services were needed. The Notice stated that she could request reconsideration within 15 calendar days of receipt of the letter.^[6] Neither PCSS nor the Department ever received a request for reconsideration.^[7]

8. While she was investigating the maltreatment reports in late July 2003, Anderson observed several instances of Licensee failing to supervise daycare children and her own children. On one occasion, Anderson was driving by Licensee's home, she observed Licensee's youngest daughter, who was then about two years old, run out into the street from the front yard. Anderson had to stop her own car to avoid hitting the child. One of Licensee's younger sons then ran out and got the girl and took her back in the front yard, which was unfenced. Anderson went around the block and the three youngest children were still playing in the front yard unsupervised when she came around. While Anderson was meeting with Licensee, there were at least two daycare children there and Anderson observed those children, as well as Licensee's own children, running in and out the front door to play on a trampoline or to go around to the back yard, all unsupervised by Licensee for periods of up to 20 minutes. She also observed a large temporary swimming pool set up in the side yard fairly near the front door, which was of concern to her because of the children running in and out of the front door. The Licensee did have a fenced area in the backyard that Licensee supposedly supervised through the open back door, but that door was closed while Anderson was present and the children were going into the backyard from the front through a gate.^[8]

9. The swimming pool is a 5,500 gallon pool about 3½ feet high, several feet across and can be filled with water up to about three feet deep. It is a round pool with a large inflatable ring around the top that holds it up. It has a motorized water pump and filter system. Licensee sets it up during the summer and takes it down in the fall. She generally intended that it be used only by her own children and their friends and not the daycare children. However, it was located at the side of the house outside the fenced in area and was accessible to children who went in and out of the front door, as they frequently did.^[9]

10. In the summer of 2003, Licensee's house was sold by her landlord. Licensee was required to move out by September 30, 2003. The house she moved into required electrical improvements before it could be licensed for child care, but those improvements were not completed for a couple months. Licensee was relicensed at the new house, her current residence, in December, 2003. She provided no day care and had no day care income during the interim.^[10]

11. From September 30 to October 27, 2004, Licensee wrote five checks to a grocery store in Fosston for groceries totaling \$286.10. She did not have sufficient funds in her account to cover the checks. The store reported the matter to the Sheriff's Office. In a Complaint filed December 31, 2003, Licensee was charged with one count of gross misdemeanor theft by check under Minn. Stat. § 609.52, subds. 2(3)(i) and 3(4) and one count of gross misdemeanor issuance of dishonored checks under Minn. Stat. § 609.535, subds. 2 and 2a.^[11] Licensee was ordered to appear in court January 14, 2004.

12. On March 18, 2004, Licensee, who apparently pled guilty to a reduced charge that day, was sentenced on an amended count of misdemeanor theft by check and the second count was dismissed. She was sentenced to 90 days in jail, but that was stayed and she was placed on probation on condition that she serve 60 days on house arrest, pay \$167.50 in fines, surcharges, and fees, and provide proof that she had paid the checks, along with other conditions.^[12] She did so.^[13]

13. On April 14, 2004, Hurd wrote Licensee to notify her that she was disqualified from direct contact with her day care children due to the conviction under Minn. Stat. § 609.52. The notice informed Licensee that she could request reconsideration of the disqualification by filing a request within 15 days.^[14] On April 19, 2004, Licensee filed a timely request for reconsideration.^[15]

14. On May 3, 2004, PCSS wrote to the Department about the reconsideration. The letter stated that in addition to the Theft by Check conviction, "two additional convictions of Wrongfully Obtaining Assistance in 1990 and 1994 exist," and that there was a misdemeanor theft conviction in 1986 "that was past the consideration period." The letter stated that Licensee's issuance of the NSF checks was a repeat occurrence and a pattern of behavior and recommended that the disqualification not be set aside.^[16]

15. Licensee believes that two events have significantly improved her ability as a daycare provider. First, the move to her current house at the end of 2003 was a great improvement for her family because it got the family off a busy street and on to a quiet street. Since then, her children have been less stressed by the environment, feel more at home, have had a reduction in their hyperactivity and are better behaved. Her sentencing on the theft by check conviction has caused her to re-evaluate herself and her daycare. She has limited the times of day and days that she operates the daycare, has restricted the pool to family use only, and has made several personal changes with herself and children. She is concerned at this point with the impact the maltreatment determination may have on any future employment she might have as an EMT.

16. On July 30, 2004, the Department issued Licensee a Notice of Disqualification – Not Set Aside and Order of Revocation^[17] The Notice stated that Licensee's disqualification for conviction of theft under Minn. Stat. § 609.52 was correct and that the disqualification would not be set aside because she posed a risk of harm to persons served by her program. Thus, she was disqualified from any position with direct contact with persons served by her program. In addition, the Notice cited several incidents of failure to supervise children adequately as separate grounds for revocation of Licensee's daycare license. These included the Child Protection finding of neglect, the unsupervised swimming pool, unsupervised children in the backyard, an unsupervised child in the street, and failure to meet the swimming pool requirements of the daycare rules. The Order informed Licensee of her right to appeal and her right to a contested case hearing.

17. Licensee filed a timely appeal. A Notice of and Order for Hearing was served on September 15, 2004, setting the hearing to take place on October 19, 2004.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245C.29, subd. 1 states that a maltreatment determination under Minn. Stat. § 626.556, is conclusive if the Commissioner has issued a final order in an appeal of that determination, the individual did not request reconsideration of the maltreatment determination under Section 626.556, or the individual did not request a hearing of the maltreatment determination under Minn. Stat. § 256.045. In this case, Licensee did not request reconsideration of the maltreatment determination under Section 626.556. Therefore, the maltreatment determination was conclusive and can not be reconsidered in this matter.

4. Minn. Stat. § 245C.14, subd. 1, requires the disqualification of individuals convicted of certain crimes from direct contact with persons such as daycare children. Those crimes include Minn. Stat. § 609.52, Theft. Licensee was convicted of misdemeanor theft under Minn. Stat. § 609.52 on March 18, 2004.^[18] Therefore, the disqualification determination was correct.

5. Under Minn. Stat. § 245C.22, subd. 4, a disqualification may be set aside if the Commissioner finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm to any persons served, considering the following factors:

- (1) the nature, severity, and consequences of the event or events that led to the disqualification;
- (2) whether there is more than one disqualifying event;
- (3) the age and vulnerability of the victim at the time of the event;
- (4) the harm suffered by the victim;
- (5) the similarity between the victim and persons served by the program;
- (6) the time elapsed without a repeat of the same or similar event;
- (7) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
- (8) any other information relevant to reconsideration.

However, preeminent weight must be given to the safety of persons served by the Licensee over the interest of the Licensee or any single factor listed above.^[19]

6. The Notice of Disqualification - Not Set Aside cited four of the statutory factors as determinative.

a. First, the vulnerability of persons served by the program was the daycare children who are vulnerable because of their age. However, the victim of Licensee's crime was the store she gave the bad checks to and not daycare children. So it cannot be said that the victim was young or vulnerable or that there is any similarity between the victim and persons served by the program.

b. The second factor cited in the Notice stated that it had been less than one year since Licensee had committed the disqualifying offense and that the type of offense was a disqualification for ten years and it was, therefore, too soon to conclude that she had changed her attitude and behavior. As noted previously, Licensee was convicted of a misdemeanor, therefore the disqualification was for seven years. In either event, it is too soon to conclude that Licensee has changed her attitude and behavior.

c. The third factor listed by the Notice was the chronicity of Licensee's offenses, which the Notice described as a long history of theft related crimes starting in 1990. That is a mischaracterization since, in fact, Licensee had had no similar offenses since 1994. Nonetheless, Licensee's willingness to violate the law and commit theft related offenses does, as the notice states, pose a risk of her committing this type of offense in the future.

d. Finally, the Notice states that Licensee has not taken responsibility for her offense in that it was her responsibility to make sure that funds were available in her account prior to writing checks. In fact, Licensee has taken responsibility for the NSF checks. She made restitution on the checks, and others for which she was not charged, before being ordered to do so by the Court. She pled guilty to misdemeanor theft, served her 60 days of house arrest, and paid her fines.

7. While conviction of a theft offense is a disqualifier by statute, it is difficult to see how the crime in this case creates any risk of harm to daycare children. It can be postulated that repeated criminal offenses, including theft, indicate a lack of respect for the law that might translate in lack of respect for the statutes and rules governing daycare. But that is too speculative a linkage to rely upon. In this case, writing bad checks for food and medicine cannot be said to create a risk of harm to daycare children. The disqualification should be set aside.

8. Minn. Stat. § 245A.04, subd. 6, requires the Commissioner to consider the facts, conditions, and circumstances concerning the program's operation and the well-being of persons served by the program, before suspending, revoking, or making conditional a license.

9. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights" of those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

10. Minn. R. 9502.0365, subpart 5, requires children in care to be supervised by a caregiver. Minn. R. 9502.0315, subpart 29a, defines "supervision" as a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child, and, for school age children, it means a caregiver being available for assistance and care so that the child's health and safety is protected. Minn. R. 9502.0425, subpart 3, requires swimming and waiting pools to be inaccessible to children except during periods of supervised use.

11. Licensee's failures to provide adequate supervision of children in her care, including both her own children and daycare children, are repeated and serious. They include the multiple failures to supervise children in her care that allowed two of her sons to engage in sexual behaviors with four to seven year old girls in daycare. They include allowing her own children and daycare children to run in and out of the house, to play in an unfenced front yard on a busy street, to wander into the street, and to have access to an unfenced swimming pool, all without supervision. They include allowing children in care to use the fenced-in backyard play area without supervision. These failures caused the children serious harm and placed them at risk of additional significant harm.

12. Licensee's failures of supervision are chronic. Not only were they repeated and serious, but Licensee seems unable to recognize the hazards created by

her failures and unwilling to take responsibility for them. She blamed one incident of her youngest daughter being in the street on her mother, whom she claimed was supposed to be watching the children. When addressing the evidence of her sons engaging in sexual behaviors with girls in daycare, rather than show concern about the children, she questioned the interview techniques of the Child Protection worker and wondered about the line between inappropriate sexual conduct and "appropriate" sexual exploration. She maintained the swimming pool without any physical means of keeping the children out of it. She claimed daycare children were not allowed in it, but allowed them to play in the yard near it. She claimed that she supervised children in the back yard through an open door, but the door remained closed while Anderson was at the house interviewing her. These failures and lack of appropriate response create additional doubt about Licensee's ability to provide safe care at this time.

13. Under Minn. Stat. § 245A.14, subd. 11, before a child cared for at the family daycare home can use a swimming pool, certain conditions must be met. These include notification to the county agency, obtaining parental approval, attending a swimming pool operator course, and many other requirements. Licensee did not comply with all the requirements, but claimed that she did not allow anyone other than her family into the pool and, therefore, that this statute does not apply to her. However, she also stated that she had one permission slip from a daycare parent to allow a child in the pool and that the rest of the parents declined to allow their children to be in the pool. She also stated that she is now strictly enforcing the rule against nonfamily members using the pool. So, there was some use by daycare children. Therefore, the requirements of Minn. Stat. § 245A.14, subd. 11, did apply to the pool. Licensee met some but not all of the requirements of the statute and therefore was in violation of the statute.

14. The numerous failures to supervise, along with the swimming pool violation, were repeated, chronic, and severe and significantly affected the health and safety of the children in Licensee's care. Revocation of her license is justified.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner order that:

1. The disqualification be **AFFIRMED**.
2. The disqualification be **SET ASIDE**.
3. The revocation of Licensee's license be **AFFIRMED**.

Dated December 2, 2004.

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded (2 tapes). No transcript prepared.

^[1] Testimony of Licensee and Irene Hurd.

^[2] Testimony of Licensee.

^[3] Testimony of Licensee and Irene Hurd. Minn. Stat. § 256.98 is not listed as a disqualifying crime under what is now Minn. Stat. § 245C.15, but Theft under Minn. Stat. § 609.52 is listed. The Department considers Wrongfully Obtaining Assistance and other theft-type crimes as equivalent to Theft, and as disqualifiers. Ex. 7. This interpretation is specifically authorized under Minn. Stat. § 245C.14, subd. 1(2), and is reasonable because the elements of wrongfully obtaining assistance also meet the definition of theft under Minn. Stat. § 609.52.

^[4] No copy of the correction order was placed in evidence.

^[5] Testimony of Jodi Anderson.

^[6] Exhibit 8.

^[7] Testimony of Licensee and James Arneson.

^[8] Testimony of Jodi Anderson.

^[9] Testimony of Licensee, Irene Hurd, and Jodi Anderson.

^[10] Testimony of Licensee and Irene Hurd.

^[11] Ex. 6.

^[12] Ex. 5.

^[13] Testimony of Licensee. Licensee testified that she had also bought some medicine at the drug store during this period and paid with an NSF check. She also repaid that.

^[14] Ex. 1.

^[15] Ex. 2.

^[16] Ex. 3.

^[17] Ex. 4.

^[18] The Order of Revocation mistakenly states that Licensee was convicted of gross misdemeanor theft. Both gross misdemeanor and misdemeanor theft are disqualifiers under Minn. Stat. § 245C.14, although the disqualification periods are different.

^[19] Minn. Stat. § 245C.22, subds. 3 & 4